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January 18, 1994

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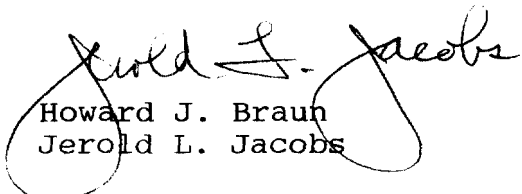
Re: **MM Docket No. 93-290**
Notice of Proposed Rule Making
To Amend §76.51(a)(1) of the Rules

Dear Mr. Caton:

Enclosed for filing, on behalf of our client, WLIG-TV, Inc. ("WLIG"), licensee of Station WLIG(TV), Riverhead, New York, are an original and nine (9) copies of the "Reply Comments of WLIG-TV, Inc." in this proceeding. WLIG's Reply Comments fully support amending §76.51(a)(1) of the cable television rules to add Riverhead to the New York, N.Y.-Linden-Paterson-Newark, N.J. major television market (#1).

Please direct any inquiries or correspondence concerning this matter to the undersigned.

Very truly yours,


Howard J. Braun
Jerold L. Jacobs

Enc.

cc: As on Certificate of Service (all w/enc.)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 76.51 of the) MM Docket No. 93-290
Commission's Rules to Include Newton,)
New Jersey and Riverhead, New York)
in the New York, New York -)
Linden-Paterson-Newark, New Jersey)
Television Market)

TO: Chief, Mass Media Bureau

REPLY COMMENTS OF WLIG-TV, INC.

WLIG-TV, INC.

Howard J. Braun
Jerold L. Jacobs

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Its Attorneys

Dated: January 18, 1994

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SUMMARY

In the subject Notice of Proposed Rule Making, the Commission preliminarily concluded that the New York - New Jersey market should be redesignated to include Riverhead, New York and Newton, New Jersey. Four broadcast licensees filed Comments which favor adding one or more new hyphenated communities to the market. In contrast, three cable companies uniformly oppose all additional hyphenations. In the accompanying Reply Comments, WLIG-TV, Inc. ("WLIG"), one of the initial hyphenation petitioners in this proceeding, fully rebuts the cable companies' anti-hyphenation Comments.

The Riverhead hyphenation fully meets all of the "commonality" criteria for hyphenation recently elaborated in the "Clermont" case -- Orlando-Daytona Beach-Melbourne-Cocoa FL Market (MM Docket No. 92-306), 8 FCC Rcd 3667 (MM Bur. 1993). There, in holding that Clermont should be added, the Commission noted that the Clermont station and the other market stations: (1) have coverage areas that substantially overlap; (2) the stations do, in fact, compete for audiences throughout the market area, thus establishing their economic interdependence; (3) Clermont is within the Orlando-Daytona Beach-Melbourne ADI; and (4) "sufficient competitive commonality [exists] such that the proposed market redesignation appropriately delineates the areas where market-area stations can and do, both actually and logically, compete".

"Commonality" does not depend upon mere mileage but, rather, as Clermont held, upon evidence of "substantially"

overlapping coverage area and competition for audience in the market area. WLIG meets Clermont's "substantial" Grade B coverage overlap test. Similarly, WLIG is in "genuine" competition with stations throughout the New York ADI because of the way that audience measurement is done and national advertising is sold -- on an ADI-wide basis. In this connection, WLIG emphasizes that Connecticut is an integral part of the New York ADI and of WLIG's audience and advertising marketing area and programming focus. Hence, WLIG's past, present, and future goals for its news and public affairs programming encompass the needs and interests of Connecticut as well as New York and New Jersey. None of the seven Comments favor "partially" hyphenating the New York - New Jersey market, and WLIG strongly opposes any such hyphenation. The New York ADI is a single market for national advertising, which should not be artificially subdivided or carved up to the competitive disadvantage of WLIG.

As to "particularized need" for a Riverhead hyphenation, there is no legal or policy basis for the cable companies' view that the copyright indemnification provision of the Cable Act was intended as a cynical restraint upon TV stations' must-carry rights and that copyright relief via hyphenation is contrary to Congressional intent. In short, WLIG's "particularized needs" for a Riverhead hyphenation are fully consistent with Congressional and Commission policy, economic reality, recent Commission policy and case precedents, §614 of the Cable Act, and the paramount public interest.

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Commission's Rules to Include Newton,)
New Jersey and Riverhead, New York)
in the New York, New York -)
Linden-Paterson-Newark, New Jersey)
Television Market)

TO: Chief, Mass Media Bureau

REPLY COMMENTS OF WLIG-TV, INC.

WLIG-TV, Inc. ("WLIG"), licensee of Station WLIG(TV), Riverhead, New York, by its attorneys, pursuant to §1.415 of the Commission's Rules, hereby submits its Reply Comments in response to the Comments filed by four broadcast licensees and three cable companies in this proceeding on December 20, 1993.¹ In support whereof, WLIG shows the following:

I. Introduction

1. WLIG is seeking the addition of Riverhead, New York -- the city of license of its Station WLIG(TV) (Ind., Channel 55) -- to the existing New York, N.Y.-Linden-Paterson-Newark,

¹ In addition to WLIG, the three broadcast licensees who filed Comments were: Mountain Broadcasting Corporation, licensee of Station WMBC-TV, Newton, New Jersey; Bridgeways Communications Corp., licensee of Station WHAI-TV, Bridgeport, Connecticut; and WTZA-TV Associates Limited Partnership, licensee of Station WTZA(TV), Kingston, New York. The three cable companies who filed Comments were: Cablevision Systems Corporation ("Cablevision"); Time Warner New York City Cable Group ("TWC"); and U.S. Cablevision Corporation ("U.S. Cablevision") (together, the "cable companies").

N.J. major market (#1) (the "New York - New Jersey" market) in §76.51(a)(1) of the Commission's Rules. In the subject Notice of Proposed Rule Making ("NPRM"), 8 FCC Rcd 8136, 8138 ¶13 (MM Bur. 1993), the Commission preliminarily concluded that the New York - New Jersey market should be redesignated to include Riverhead, New York and Newton, New Jersey. However, the Commission also requested comment on "alternative possibilities" including: grant of a program exclusivity waiver to WLIG in lieu of a Riverhead hyphenation (id. at 8138-39 ¶14); adding one or more additional New Jersey, New York, and Connecticut TV station cities of license to the re-hyphenated market (id. at 8139 ¶15); and "partially" hyphenating the New York - New Jersey market by creating two markets -- a New York City/Newton or New York City/New Jersey market and a separate New York City/Riverhead or New York City/Long Island market (id. at 8139 ¶16).

2. The four broadcast licensees (see footnote 1 above) favor adding one or more new hyphenated communities to the New York - New Jersey market. In contrast, the three cable companies uniformly oppose all additional hyphenations, thereby mirroring the cable industry's general hostility toward must-carry stations' attempts to gain competitive equality with each other and with ADI market cable systems under the Cable Television Consumer Protection and Competition Act of 1992 ("the Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460 (1992), and the Commission's implementing must-carry

rules adopted in Report and Order in MM Docket No. 92-259 ("Report and Order"), 8 FCC Rcd 2965 (1993). In this Reply, WLIG will fully rebut the cable companies' anti-hyphenation Comments and will "set the record straight" where the Comments have confused the law or the facts.

3. At the outset, WLIG notes that the TV stations licensed to Secaucus, New Jersey and Poughkeepsie and Smithtown, New York did not file hyphenation requests or Comments and that the record does not contain any expressions of interest by them in having their communities of license added to the New York - New Jersey market. For these reasons, WLIG requests that the NPRM's proposal to add those three communities be dismissed as moot.

II. The Riverhead Proposal Fully Meets the Commission's Hyphenation Criteria

4. In the NPRM, supra, 8 FCC Rcd at 8138 ¶13, the Commission briefly stated the governing test for adding communities to a hyphenated market: "commonality between the proposed community to be added...and the market as a whole". This standard was more fully elaborated recently in Report and Order in MM Docket No. 92-306 (Orlando-Daytona Beach-Melbourne-Cocoa FL market) (the "Clermont" hyphenation case), 8 FCC Rcd 3667 (MM Bur. 1993). There, in holding that Clermont should be added to the Orlando-Daytona Beach market, the Commission noted, id. at 3667, that the Clermont station and the other market stations: (1) have coverage areas that sub-

stantially overlap; (2) the stations do, in fact, compete for audiences throughout the market area, thus establishing their economic interdependence; (3) Clermont is within the Orlando-Daytona Beach-Melbourne ADI; and (4) "sufficient competitive commonality [exists] such that the proposed market redesignation appropriately delineates the areas where market-area stations can and do, both actually and logically, compete".

5. WLIG submits that all of the Clermont criteria and findings apply equally well to the addition of Riverhead as a hyphenated community in the New York - New Jersey market, as WLIG fully elaborated in its July 14, 1993 Petition for Rule-making ("Petition") at ¶¶6-10 and in its December 20, 1993 Comments at ¶¶4-13. WLIG will now respond to the "commonality" objections in the cable Comments.

6. Cablevision and U.S. Cablevision assert that Riverhead is too distant from the existing hyphenated communities in the New York - New Jersey market, that WLIG is not viewable throughout the New York ADI, that there is no "genuine" competition among the stations in the proposed hyphenated market, and that WLIG's programming is not regarded as "local" throughout the ADI. As WLIG will now show, these contentions are factually incorrect or legally irrelevant.

7. In Amendment of Section 76.51 (Orlando, Daytona Beach, Melbourne, and Cocoa FL) (the "Orlando" case), 102 FCC 2d 1062 (1985), the Commission held that major market communities located more than 75 miles apart (Melbourne and Daytona

Beach) are in economic competition with each other and part of the same hyphenated market. Thus, there is nothing novel about a hyphenated market of the size proposed in this Riverhead proceeding, and there is nothing inappropriate about increasing the number of hyphenated communities in a hyphenated market such as New York - New Jersey if the resulting hyphenated market mirrors economic reality. In the Cable Television Report and Order, 36 FCC 2d 143, 176 ¶87 (1972), the Commission stated that its basic purpose in hyphenating markets is to help "equalize competition between stations in [the] market...and to assure that stations will have access to cable subscribers in the market and that cable subscribers will have access to all stations in the market". A Riverhead hyphenation will accomplish those goals. Hence, the distance from Riverhead to New York, New York and to Linden, Paterson, and Newark, New Jersey has little significance. "Commonality" does not depend upon mere mileage but, rather, as the Clermont case held, id. at 3667 ¶3, upon evidence of "substantially" overlapping coverage area and competition for audience in the market area.

8. As to viewing and overlapping coverage areas, Exhibit 1 of WLIG's Petition shows that WLIG's predicted Grade B contour encompasses all or part of the New York State counties of Nassau, Suffolk, Queens, Bronx, and Westchester and the Connecticut counties of Fairfield and New Haven, and that its Grade B contour wholly or partially overlaps the

Grade B contours of the New York City TV stations (using WCBS-TV as an example) in those counties. Contrary to Cablevision's view, hyphenation does not require that WLIG's signal be available or viewable off-air "throughout" the New York ADI (Comments at 4); WLIG meets Clermont's "substantial" Grade B coverage overlap test.

9. Turning to the questions of WLIG's "localism" and its competition with the Hyphenated Community Stations,² Congress made the legislative judgment in the Cable Act that the ADI defines what a "local" station is. See House Committee on Energy and Commerce, H. Rep. No. 102-628, 102d Cong., 2d Sess., at 97 (June 29, 1992) ("House Report"), which stated (emphasis added):

The Committee recognizes that ADI lines establish the market in which television [stations] buy programming and sell advertising...The Committee believes that ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition.

Thus, the cable companies' implication that, to be regarded as "local" for hyphenation purposes, WLIG must be licensed to the same or nearby communities as other hyphenated stations, or that cable communities must be located within WLIG's 35-mile zone or Grade B contour, has no legal basis under the Cable

² Those stations are the eight commercial TV stations licensed to the presently hyphenated communities in the New York - New Jersey market: WCBS-TV, WNBC-TV, WNYW, WABC-TV, and WPIX, New York, New York; WXTV, Paterson, New Jersey; WNJU, Linden, New Jersey, and WHSE, Newark, New Jersey.

Act or the Commission's current cable regulatory program. See the Clermont case. supra.

10. Similarly, WLIG is in "genuine" competition with stations throughout the New York ADI because of the way that audience measurement is done and national advertising is sold -- on an ADI-wide basis.³ Cablevision should be especially aware of this reality because Cablevision itself sells advertising throughout the ADI through New York Interconnect (WNYI). That WNYI offers one-stop purchase and satellite-delivery of TV advertising to cable systems serving 3.5 million households (9.2 million viewers) throughout the New York ADI further demonstrates the economic integrity of the tri-state area (New York, New Jersey, and Connecticut) and the fact that WLIG's economic prosperity is dependent upon competing with market stations throughout the ADI.

11. In this connection, WLIG emphasizes that although it has been referring to the "New York - New Jersey market" for hyphenation purposes, Connecticut is an integral part of the New York ADI and of WLIG's audience and advertising marketing

³ Cablevision implies that since WLIG has characterized itself as being a "distinctly local Long Island station" (Cablevision Comments at 3) in its pending civil antitrust suit against Cablevision, WLIG cannot meet the Clermont "commonality" standards for a Riverhead hyphenation. However, WLIG's antitrust suit alleges Cablevision's monopolization of local advertising in Nassau and Suffolk Counties; WLIG's competition with the Hyphenated Community Stations for national advertising, audience measurement, audience, and programming is not inconsistent with Cablevision's monopolization of a market or submarket for local advertising in Nassau and Suffolk Counties.

area and programming focus. The Connecticut counties of Fairfield and New Haven are within WLIG's predicted Grade A contour. The headends of Cablevision's Bridgeport and Norwalk systems are only 30 and 40 miles away, respectively, from Riverhead, and both systems are currently carrying WLIG. Hence, WLIG's past, present, and future goals for its news and public affairs programming encompass the needs and interests of Connecticut as well as New York and New Jersey.

12. Put differently, WLIG strongly disagrees with the cable companies' view that TV viewers in the tri-state area already have ample suburban-directed news and public affairs programming from the Hyphenated Community Stations. WLIG fully intends to expand its local and regional news and public affairs coverage with special emphasis on the suburbs of New York City, which are not adequately served by the Hyphenated Community Stations. The first stage of this was completion in December 1993 of a new, 1800-square foot, state-of-the-art news and public affairs television studio, along with fully equipped control rooms. A complete news staff has also been hired, including a news director, reporters, photographers, meteorologist, news anchors, and sports reporter. This is a major investment by WLIG as it competes for news viewers and advertisers in the entire ADI. In addition, on January 10, 1994, WLIG began broadcasting a 10 PM, thirty-minute, locally-produced news program, featuring special coverage of events in the Long Island and Metropolitan New York area, including

Connecticut and New Jersey -- the tri-state area. In the coming months, WLIG will open additional news bureaus in Connecticut and New Jersey in order to specifically and regularly address Connecticut and New Jersey issues and concerns. WLIG also has plans in the immediate future to add an early evening, thirty-minute, locally-produced newscast to complement the 10 PM news program.

13. Another relevant Congressional and Commission finding and objective under the Cable Act and implementing Commission rules is that, given the historical economic disadvantage of emerging UHF stations and the special tendency of cable systems to resist carriage of UHF stations, the must-carry requirements for all ADI stations should help ensure the viability of independent UHF TV stations and should equalize competition between VHF and UHF stations. See House Report, supra, at 52 (quoting with disapproval remark of one cable operator who dropped local signals: "Why have people trained to watch UHF?"); Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 3282, 3333 (1993) (exempting "emerging networks" from application of the finsyn rules in part because the Fox network has provided a solid financial base to stations "which were formerly marginal independent UHF stations"). As an independent UHF station which has faced substantial adversity and competitive inequality since it went on the air eight years ago, WLIG fully endorses the propriety and wisdom of this emphasis on UHF viability and equalized

competition with VHF stations, which is fostered by approval of the proposed Riverhead hyphenation.

14. Only a few words need be said about TWC's Comments, which -- in four sentences out of 14 pages -- refer to WLIG's hyphenation request. It is obvious that TWC's Comments are intended only for Newton, New Jersey Station WMBC-TV, since they are factually inapposite to WLIG. As noted in TWC's Comments, TWC carries WLIG on its Manhattan, Queens, and western Brooklyn cable systems.

15. Finally, WLIG notes that none of the seven Comments favor "partially" hyphenating the New York - New Jersey market. As explained in its Comments (at ¶¶14-16), WLIG strongly opposes any such hyphenation, which, by placing New York City in two markets, would therefore continue -- and even increase -- the competitive imbalance which exists in the New York ADI. The reason is that such a "partial" hyphenation ensures that the most powerful stations in the ADI -- the New York City stations -- will retain their hyphenation-related exclusivity and copyright liability advantages in both New York City hyphenated markets while WLIG would not be protected in a major portion of the New York ADI. In short, the New York ADI is a single market for national advertising, which should not be artificially subdivided or carved up to the competitive disadvantage of WLIG.

16. In sum, the public record in this proceeding fully meets the Commission's criteria for a Riverhead hyphenation.

III. WLIG's "Particularized Needs" Satisfy the Cable Act and Commission Guidelines

17. In its Petition (at ¶8(3)) and its Comments (at ¶¶ 4-9), WLIG emphasized three "particularized needs" (in the language of the Orlando case, supra) warranting a Riverhead hyphenation: 1) to cure the existing competitive imbalance between WLIG and the Hyphenated Community Stations; 2) to protect WLIG against staggering copyright liability in certain cable communities in which WLIG is currently deemed to be a distant signal under the cable compulsory copyright license, 17 U.S.C. §111, even though it is a must-carry station; and 3) to prevent situations in which WLIG may face syndicated program exclusivity "blackouts" on cable systems in favor of Hyphenated Community Stations with the same programming, even though both stations have must-carry rights.

18. In response to these concerns, Cablevision incorrectly asserts that hyphenation would burden it with signal carriage requirements exceeding what the Cable Act contemplated. Also, Cablevision and TWC claim that hyphenation would "upset the balance between copyright and signal carriage obligations," and TWC and U.S. Cablevision fear that this proceeding will produce "wholesale revisions" of \$76.51, contrary to Congressional and Commission intent. U.S. Cablevision recommends stay of this proceeding until the U.S. Copyright Office concludes an inquiry proceeding entitled Cable Compulsory License; Major Television Market List ("Cable

Compulsory License"), 58 Fed. Reg. 34594 (June 28, 1993), and urges that "significant viewing" showings, rather than hyphenation, should be used to gain copyright relief beyond a station's 35-mile zone. The cable companies are wrong in all respects.

19. It is clear from the legislative history and language of the Cable Act that Congress established in §614 a veritable Bill of Rights for the carriage of "local commercial television stations" by cable systems. §614(h) requires indemnification of cable systems for "any increased copyright liability resulting from carriage" purely to avoid saddling the cable systems with a copyright "penalty" for compliance -- not to undercut the must-carry rights that §614 bestows on local TV stations throughout their ADI. Since local stations are the beneficiaries of such carriage, they are obliged to reimburse the cable systems for any additional copyright expenses. Thus, contrary to Cablevision, copyright indemnification is a condition for carriage, not a "qualifying" factor for must-carry status.

20. Under these circumstances, WLIG maintains that it is appropriate, as the Commission recently held in Amendment of Section 76.51 (Los Angeles-San Bernardino-Corona-Fontana CA), DA 93-1444, ¶¶4-5, released December 7, 1993, to treat copyright liability protection as a valid "particularized need" for WLIG so that WLIG may take maximum advantage of its must-carry rights under §614 via hyphenation. The fact that the

Hyphenated Community Stations, which are must-carry stations just like WLIG, do not have to pay any copyright indemnity further illustrates the competitive imbalance which WLIG currently faces without a Riverhead hyphenation.

21. In sum, there is no legal or policy basis for the cable companies' view that the copyright indemnification provision of §614(h) was intended as a cynical restraint upon TV stations' must-carry rights and that copyright relief via hyphenation is contrary to Congressional intent. Indeed, in Cable Compulsory License, supra, at 34595-96, the Copyright Office indicated that its present policy is generally to give effect to the "local" copyright implications of Commission hyphenation decisions, so long as only renaming markets is involved, and that it "is inclined to maintain [that] 1987 Policy Decision regarding renaming of markets". Moreover, while its inquiry is pending, the Copyright Office "will not question the designation of local signal status based on the FCC's action to rename one or more of the major markets". Id. at 34596. Therefore, the copyright relief aspect of hyphenation appears validated and secure, and there is no basis for a stay of this proceeding.

22. Furthermore, this proceeding is part of the case-by-case reexamination of §76.51 of the Rules mandated by Congress in §614(f) of the Cable Act "to update" the Rule. The Commission specifically ruled out any "wholesale revision" of §76.51 in the Report and Order, supra, at 2978 ¶50, and

established the "commonality" standard for its case-by-case actions, which WLIG fully meets. Hence, there are already adequate safeguards in place to allay the cable companies' concerns that this proceeding is part of any "wholesale revision" of the Rule or will have any "domino effect".

23. Finally, although U.S. Cablevision correctly maintains that "significant viewing" surveys are another way that a TV station can qualify as "local" for copyright relief purposes, it is wrong when it urges that such surveys should be the only permissible way to qualify as "local". Again, there is no legal or policy basis for such a "requirement," and, as WLIG has shown above, hyphenation is also a legally permissible and fully appropriate method -- especially given the "commonality" showing which WLIG has made. In sum, WLIG's "particularized needs" for a Riverhead hyphenation are fully consistent with Congressional and Commission policy.

IV. ADI Modification Arguments Are Irrelevant in This Proceeding

24. The cable companies attempt to insinuate "ADI modification" arguments into this proceeding. In particular, Cablevision claims that favorable action on WLIG's Riverhead hyphenation request will "prejudice" Cablevision's pending petition for special relief which requests modification of the New York ADI to exclude certain communities from WLIG's television market.

25. The Commission specifically stated in footnote 2 of the subject NPRM that Cablevision's ADI modification arguments are irrelevant here, since this proceeding concerns the "status of the stations if carried by market-area systems" (emphasis in original). And the Commission further assured Cablevision that any action in this proceeding is "without prejudice to Cablevision's efforts to defeat the must-carry status" of WLIG. Id. Finally, Cablevision has provided no support for its claim of "extraordinary and unnecessary service disruptions" to subscribers, due to "forced carriage," if this proceeding is concluded before the special relief proceeding.

V. Conclusion


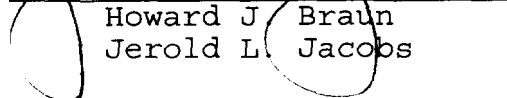
26. Hyphenating the New York - New Jersey market to include Riverhead is fully consistent with Congressional and Commission law and policy to "update" §76.51, equalize competition between WLIG and the Hyphenated Community Stations within the market, and provide copyright relief to WLIG. In these hyphenation proceedings, the Commission is correctly focusing on making its cable rules match economic reality, and the proposed hyphenation of Riverhead will help do that. On the other hand, excluding Riverhead is strictly artificial, and, as WLIG has explained in its Petition and Comments, such exclusion would have severe competitive inequality and copyright liability consequences for WLIG.

27. WLIG reiterates its belief (Comments at ¶¶17-18) that giving it a waiver of the syndicated exclusivity rules in lieu of hyphenating the New York - New Jersey market is not a viable solution to its most serious problems, which relate to copyright liability and inequality of competition for advertising revenues. Although a waiver might resolve the blackout problem, only a Riverhead hyphenation will cure WLIG's copyright liability and competitive imbalance problems. In WLIG's view, nothing less than hyphenation will save it from these problems, so that failure to grant WLIG's hyphenation proposal will have serious adverse consequences for WLIG. In sum, grant of WLIG's Petition is fully consistent with economic reality, recent Commission policy and case precedents, §614 of the Cable Act, and the paramount public interest.

WHEREFORE, in light of the foregoing, WLIG-TV, Inc. respectfully requests that the Commission should amend §76.51(a)(1) of the Rules and add Riverhead, New York to the New York - New Jersey market.

Respectfully submitted,

WLIG-TV, Inc.

By: 

 Howard J. Braun
 Jerold L. Jacobs

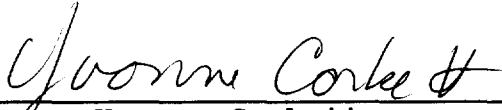
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Dated: January 18, 1994

CERTIFICATE OF SERVICE

I, Yvonne Corbett, a secretary in the law offices of Rosenman & Colin, do hereby certify that on this 18th day of January, 1994, I have caused to be mailed, or hand-delivered, a copy of the foregoing "**REPLY COMMENTS OF WLIG-TV, INC.**" to the following:



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